

**A Dr Dieter Gobbers v Jacob and Toralf Consulting Sdn Bhd &
Ors and other appeals**

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS
W-02(IM)-1921-09 OF 2013, W-02(IM)-1922-09 OF 2013,
W-02(IM)-2173-10 OF 2013 AND W-02(IM)-2195-10 OF 2013
MOHAMAD ARIFF, MAH WENG KWAI AND UMI KALTHUM JJCA
21 AUGUST 2014

C *Civil Procedure — Stay of proceedings — Special circumstances — Application
for stay for matter to be referred to arbitration — Whether undesirability of
concurrent proceedings — Whether there was expense and inconvenience of
D duplicated proceedings*

The plaintiffs commenced this action against the defendants premised on an
allegation of fraudulent misrepresentation. The second, third and fourth
defendants had applied to set aside the writ and statement of claim but were
unsuccessful in the High Court, Court of Appeal and the Federal Court. The
E second, third and fourth defendants had thus accordingly filed their defence on
23 November 2010. However, in respect of the first defendant, the Court of
Appeal and the Federal Court had allowed the first defendant's application for
stay of proceeding for the matter to be referred to arbitration. The first
F defendant and the plaintiffs then commenced arbitration proceedings. Based
on the arbitration proceedings, the second, third and fourth defendants
applied to stay the High Court action pending the outcome of the arbitration
between the first defendant and the plaintiffs on the grounds that the issues,
nature and characteristics of the claim in the arbitration proceedings and the
G civil suit were similar and overlapped. Despite the learned judicial
commissioner ('the JC') having found and recognised that the current
circumstances did warrant a stay, the JC nevertheless dismissed the application
for stay on the grounds that she was bound by the earlier ruling of the Court of
Appeal and Federal Court that it was not undesirable to have concurrent
H proceedings before two different tribunals. The second, third and fourth
defendants' appealed against the JC's decision. The issue arising for
determination was whether the Court of Appeal and the Federal Court, in
permitting the first defendant to proceed with arbitration and ordering
separate proceedings, had implicitly directed the arbitration proceedings and
I the court proceedings to proceed concurrently notwithstanding the risk of
inconsistent decisions.

Held, allowing the appeal with costs:

- (1) There was a fundamental error in the JC's finding that the Court of Appeal and the Federal Court had directed the second to the fourth defendants to file the defence when in fact the defences had been filed between March and November 2010. The Court of Appeal decision was given on 26 April 2011. The Court of Appeal had never directed the Defendants to file their defences. The JC had felt bound by these 'directives' which were established to be non-existent. This was a fundamental flaw which rendered the JC's decision liable to be set aside (see para 18). A B
- (2) The JC finding that concurrent proceedings are generally undesirable as it will cause confusion and injustice and that if the present proceedings were not stayed there will be the prospect that the applicants/defendants will be put to considerable expense and inconvenience of duplicated proceedings were correct findings of facts on the evidence and the pleadings of the parties. These findings constituted special circumstances and thus the court's discretion to grant the stay applications was exercised in favour of the defendants (see para 19). C D

[Bahasa Malaysia summary]

Plaintif-plaintif memulakan tindakan ini terhadap defendan-defendan berdasarkan dakwaan salah nyata fraud. Defendan kedua, ketiga dan keempat telah memohon untuk mengetepikan writ dan penyata tuntutan tetapi tidak berjaya di Mahkamah Tinggi, Mahkamah Rayuan dan Mahkamah Persekutuan. Defendan kedua, ketiga dan keempat oleh itu telah memfailkan pembelaan mereka sewajarnya pada 23 November 2010. Walau bagaimanapun, berkaitan dengan defendan pertama, Mahkamah Rayuan dan Mahkamah Persekutuan telah membenarkan permohonan defendan pertama untuk penangguhan prosiding untuk perkara itu dirujuk kepada timbang tara. Defendan pertama dan plaintiff-plaintif kemudiannya memulakan prosiding timbang tara. Berdasarkan prosiding timbang tara, defendan kedua, ketiga dan keempat memohon untuk penangguhan kepada tindakan Mahkamah Tinggi yang menunggu keputusan timbang tara antara defendan pertama dan plaintiff-plaintif atas alasan bahawa isu-isu, jenis dan sifat-sifat tuntutan dalam prosiding timbang tara dan guaman sivil adalah serupa dan bertindanan. Walaupun Yang Arif pesuruhjaya kehakiman ('PK') mendapati dan mengenal pasti bahawa keadaan semasa memerlukan penangguhan, PK walau bagaimanapun menolak permohonan untuk penangguhan atas alasan dia terikat dengan keputusan terdahulu Mahkamah Rayuan dan Mahkamah Persekutuan bahawa ia adalah bukan sesuatu yang tidak diingini untuk mempunyai prosiding serentak sebelum dua tribunal yang berbeza. Defendan kedua, ketiga dan keempat merayu terhadap keputusan PK itu. Isu yang timbul untuk penentuan adalah sama ada Mahkamah Rayuan dan Mahkamah Persekutuan, dalam membenarkan defendan pertama untuk meneruskan timbang tara dan memerintahkan prosiding berasingan, telah secara tersirat E F G H I

A mengarahkan prosiding timbang tara dan prosiding mahkamah untuk meneruskan secara serentak walaupun terdapat risiko keputusan yang tidak konsisten.

Diputuskan, membenarkan rayuan dengan kos:

- B (1) Terdapat kesilapan asas dalam dapatan PK bahawa Mahkamah Rayuan dan Mahkamah Persekutuan telah mengarahkan kepada defendan kedua hingga keempat untuk memfailkan pembelaan yang mana sebenarnya pembelaan telah difailkan antara Mac dan November 2010. Keputusan
- C Mahkamah Rayuan telah diberikan pada 26 April 2011. Mahkamah Rayuan tidak pernah mengarahkan defendan untuk memfailkan pembelaan mereka. PK telah merasa terikat dengan 'directive' yang telah dibuktikan tidak wujud. Ini adalah suatu kesilapan asas yang menyebabkan keputusan PK diketepikan (lihat perenggan 18).
- D (2) PK mendapati bahawa prosiding serentak secara umumnya tidak diingini kerana ia akan menyebabkan kekeliruan dan ketidakadilan dan bahawa jika prosiding semasa tidak ditangguhkan akan menjadi prospek bahawa pemohon/defendan akan dikenakan perbelanjaan yang banyak dan kesulitan prosiding pendua adalah penemuan fakta yang betul pada
- E keterangan dan pliding pihak-pihak. Penemuan ini merupakan keadaan tertentu dan dengan itu budi bicara mahkamah untuk membenarkan permohonan penangguhan telah dilaksanakan memihak kepada defendan (lihat perenggan 19).]

F Cases referred to

AV Asia Sdn Bhd v MEASAT Broadcast Network Systems (M) Sdn Bhd & Anor [2011] 8 MLJ 792, HC (refd)

Caseceli v Natuzzi SpA [2012] FCA 691, FC (refd)

G *Citigroup Global Markets Ltd v Amatra Leveraged Feeder Holdings Ltd and Ors* [2012] EWHC 1331, QBD (refd)

Cosmos Industry Solution GMBH v Jacob and Toralf Consulting Letrikon Sdn Bhd & Ors [2012] 4 MLJ 573, CA (refd)

De Dampierre v De Dampierre [1988] AC 92, HL (refd)

H *ET Plus SA v Welter* [2006] 1 Lloyd's Rep 251, QBD (refd)

Reichhold Norway ASA v Goldman Sachs International [2000] 2 All ER 679, CA (not folld)

Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals [2010] 5 MLJ 394, CA (refd)

I *Shanghai Contruction (Group) General Co Singapore Branch v Tan Poo Seng* [2012] SGHCR 10, HC (refd)

Appeal from: Civil Suit No S-22-129 of 2009 (High Court, Kuala Lumpur)

Mark La Brooy (Hew Sheau Ying with him) (Raja Daryl & Loh) in Civil Appeal

Nos W-02(IM)-1921-09 of 2013 and W-02(IM)-2195-10 of 2013 for the appellant.

A

Harjinder Kaur (KS Ng with him) (Shahrizat Rashid & Lee) in Civil Appeal Nos W-02(IM)-1922-09 of 2013 and W-02(IM)-2173-10 of 2013 for the appellant.

Stanley Isaacs (C Sivasankar and Shara Ann Isaacs with him) (Isaac, Tan & Chu) in Civil Appeal Nos W-02(IM)-1921-09 of 2013 and W-02(IM)-2195-10 of 2013, W-02(IM)-1922-09 of 2013 and W-02(IM)-2173-10 of 2013 for the respondents.

B

Umi Kalthum JCA:

C

[1] There were four appeals before us to be heard together. They were Nos W-02(IM)1921-09 of 2013 ('No 12'), W-02(IM)1922-09 of 2013 ('No 13'), W-02(IM)2173-10 of 2013 ('No 14') and W-02(IM)2195-10 of 2013 ('No 15').

D

[2] At the outset parties agreed for the court to hear appeals in Nos 14 and 15 first, and that if the court allowed the appeals in Nos 14 and 15, then the appeals in Nos 12 and 13 would become redundant.

E

[3] We then proceeded to hear the parties in respect of appeals in Nos 14 and 15. We had unanimously allowed the appeals in Nos 14 and 15 with costs of RM15,000 each to be paid to the appellants by the respondents and had set aside the order of the High Court dated 25 September 2013 (grounds of judgment of the learned judge was dated 10 October 2013). With that decision, the appellants in appeal Nos 12 and 13 withdrew their appeals and we had struck out those appeals with costs of RM5,000 for both appeals Nos 12 and 13 to be paid by the appellants. We now give our grounds for our decision.

F

BRIEF FACTS

G

[4] This was an appeal by the appellants/the second, third and fourth defendants in respect of the High Court decision dated 25 September 2013 dismissing the appellants' application for a stay of proceedings pending the outcome of the arbitration between the first defendant and the respondents (including the sixth defendant). For ease of reference, we refer the parties as they are referred to in the High Court.

H

[5] In order to understand the factual matrix why the appeal we set forth some brief facts as alluded to by the appellants' counsel's submission:

I

- (a) the plaintiffs commenced this action against the defendants premised on an allegation of fraudulent misrepresentation. The plaintiff alleged that pursuant to negotiations between the plaintiffs and the first defendant,

- A** the plaintiffs were induced into entering a settlement agreement dated 31 July 2008 ('the settlement agreement'). The settlement agreement was performed;
- B** (b) the plaintiffs claim against the defendants a sum of EUR35m and alternatively 25% of the benefits obtained by the first to fourth defendants from the sale of shares in the first defendant to Siemens AG; an order for the first to fifth defendants to account to the plaintiffs the details of the share sale transaction between them and Siemens AG; an account of the benefits and/or profits made by the first to fifth defendants from the sale of the entire shares in the first to fourth defendants to Siemens AG; and alternatively, an order that the second and fifth defendants to indemnify the plaintiffs for all losses, damages and injury caused to the plaintiffs for inducing the plaintiffs to enter into the settlement agreement upon the fraudulent misrepresentations of the second and fifth defendants, together with interest and costs;
- C**
- D**
- E** (c) the second, third and fourth defendants applied to set aside the plaintiffs' writ, notice of writ and statement of claim based on jurisdictional grounds. The High Court, Court of Appeal and the Federal Court did not allow the second, third and fourth defendant's application and the second, third and fourth defendants had accordingly filed their defence on 23 November 2010;
- F** (d) the fifth defendant's position is similar to the second, third and fourth defendants in his application to set aside the same but the fifth defendant chose not to appeal against the High Court decision to dismiss his application. He accordingly filed his defence on 11 November 2010;
- G** (e) however, in respect of the first defendant, the Court of Appeal and the Federal Court had allowed the first defendant's application for stay of proceeding for the matter to be referred to arbitration at the International Chamber of Commerce ('the ICC');
- H** (f) the effect by the Court of Appeal and Federal Court's decisions in allowing the first defendant stay application is that:
- I** (i) the plaintiffs' claim against the first defendant is referred to arbitration;
- (ii) the plaintiffs' claim in the High Court against the first defendant is stayed pending the outcome of arbitration;
- (iii) the first defendant takes no further steps in the proceedings; and
- (iv) the first defendant need not file its statement of defence,

- (g) the first defendant and the plaintiffs (including the sixth defendant who was previously the third plaintiff) have commenced arbitration proceedings at the ICC which is currently on-going; **A**
- (h) based on the abovementioned arbitration proceedings between the plaintiffs and the first defendant, the second, third and fourth defendants filed an application at the High Court to stay the High Court action pending the outcome of the arbitration between the first defendant and the plaintiffs (in encl 174); **B**
- (i) the purpose of encl 174 was to stay the High Court action against the second, third and fourth defendants (the fifth defendant had also made a similar stay application) pending the outcome of the arbitration between the plaintiffs and the first defendant; **C**
- (j) the basis to stay the High Court action was on the ground that, amongst others, the issues, nature and characteristics of the claim in the arbitration proceedings and this civil suit are similar and overlap. In fact, the main and essential defendant in this action is the first defendant; and **D**
- (k) on 25 September 2013, the second, third and fourth defendants' application for stay of proceedings pending arbitration (encl 174) was dismissed with costs. Hence this appeal (similar appeal was filed by the fifth defendant.) **E**

BEFORE THE HIGH COURT

[6] After deliberating on the facts and submissions of the parties, the learned judicial commissioner ('the JC') found that there are compelling factors for granting a stay. They are: **F**

- (a) concurrent proceedings are generally undesirable as it will cause confusion and injustice. As the issues in the arbitration proceedings and the court proceedings are substantially the same, parties will face considerable expense and inconvenience of duplicated proceedings if the court proceedings are not stayed; **G**
- (b) regardless of whether the arbitral proceedings are ultimately decisive of the claims, it will at least clarify the landscape; and **H**
- (c) the arbitration proceedings between the plaintiffs and the first defendant would be concluded in the next few months. **I**

[7] Despite the learned JC having found and recognised that the current circumstances did warrant a stay, the learned JC nevertheless dismissed the second, third and fourth defendants' application for stay (as well as the fifth defendant's application for stay.) Her Ladyship found that she is bound by the

- A Court of Appeal and Federal Court's ruling that it is not undesirable to have concurrent proceedings before two different tribunals. This was what she said at para 30 of her grounds of judgement (p 61 AR, *Jld* 1(1), *Bahagian* A, Appeal No 14):
- B 30. Be that as it may, the Court of Appeal and the Federal Court have ruled that it is not undesirable to have concurrent proceedings before two different tribunals, the effect is that both Courts have implicitly directed both the court and arbitral proceedings to proceed concurrently. This court is bound by those decisions and not at liberty to direct otherwise. To allow a stay of this proceedings pending the determination of the arbitration in Singapore, would fly in the face of the decisions
- C of the Court of Appeal and Federal Court directing the defendants to file their defences and to proceed with the trial.

BEFORE US

D *The appellants' grounds of appeal*

- [8] The appellants' grounds of appeal are as set forth in the memorandum of appeal at pp 33–39, AR Vol 1(1) *Bahagian* A (No 14) and pp 15–23, AR Vol 1/3, *Bahagian* A (No 15). However the following summarised grounds were
- E argued before us:
- (a) whether a stay of proceedings should be granted where the issues before the arbitral proceedings and the court proceedings are substantially the same;
 - F (b) whether the Court of Appeal and the Federal Court, in permitting the first defendant to proceed with arbitration and ordering separate proceedings, had implicitly directed the arbitration proceedings and the court proceedings to proceed concurrently notwithstanding the risk of inconsistent decisions; and
 - G (c) whether a stay of proceedings should be granted where the arbitral proceedings would be concluded in the next few months and a stay of proceedings will not work any significant injustice upon the respondents and the respondents can be adequately compensated by an
 - H award of interest for any delay that would result from the stay.

The appellants/the first, second, third, fourth and fifth defendants' submission

- I [9] It was submitted by the appellants/the second, third, fourth and fifth defendants that the learned JC was under a misapprehension that the Court of Appeal and the Federal Court in permitting the first defendant to proceed with arbitration and ordering separate proceedings had implicitly directed the arbitration proceedings and the court proceedings to proceed currently notwithstanding the risk of inconsistent decisions. In fact, the Court of Appeal

and the Federal Court had never decided on the issues other than the first defendant's position for a stay. Neither did the second, third, fourth and fifth defendants make any application of such a nature at that time for a stay pending arbitration. The issue of whether the second, third, fourth and fifth defendants were entitled to stay the proceedings pending the arbitration between the first defendant and the plaintiff (and the sixth defendant) was never canvassed at the hearings before the Court of Appeal and the Federal Court. This was clearly shown in the Court of Appeal judgment dated 26 April 2011.

[10] The underlying purpose and basis for a stay of proceedings pending arbitration between the plaintiffs and the first defendant is on the grounds that the issues, nature and characteristic of the claim in the arbitration proceedings and the court proceedings are similar and overlap. The main and essential defendant in this civil suit is the first defendant who has been excluded from participating in this civil suit pursuant to the stay order obtained by the first defendant. It was submitted that such a position would be most undesirable and in fact extremely prejudicial to any of the parties where there are two opposing sets of decision, that is, one allowing a claim and the other disallowing based on the same nature of claim against the same plaintiffs and different defendants. Therefore, there exists special circumstances for the second, third, fourth and fifth defendants to obtain a stay pending the said arbitration as there is a clear risk of conflicting decisions by the civil court and the ICC on the same issues.

[11] Reference was made to *De Dampierre v De Dampierre* [1988] AC 92 at p 98, where Lord Goff stated, of earlier foreign proceedings, that where:

Under the principle of forum non conveniens now applicable in England as well as in Scotland, the court may exercise its discretion under its inherent jurisdiction to grant a stay where 'it is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interest of the parties and for the ends of justice' ... Genuine proceedings have been started and have not merely been started but have developed to the stage where they have had some impact on the dispute between the parties, especially if such impact is likely to have a continuing effect, then this may be a relevant factor to be taken into account when considering whether the foreign jurisdiction provides the appropriate forum for the resolution of dispute between the parties.

Based on the above quoted case, it was submitted that it is undesirable to have concurrent proceedings as the exclusion of the first defendant in this civil suit would be highly prejudicial to the second, third, fourth and fifth defendants and incapable of producing a fair and just result as the first defendant is the essential party to the plaintiffs' alleged cause of action based on the settlement agreement.

A [12] It was also submitted that the plaintiffs' counsel at the Federal Court (in respect of the first defendant's stay application) had also taken the position that the issues between the plaintiffs and all the defendants and the first defendant are so intertwined that it would be impossible to have separate set-of proceedings; that the court proceeding herein cannot proceed until the determination of the arbitration proceedings involving the plaintiffs and the first defendant. Based on this unequivocal recognition and stand taken by the plaintiffs at the Federal Court, it would be undesirable and contradictory for the plaintiffs to now oppose this stay application.

C [13] The second, third, fourth and fifth defendants also relied on *Reichhold Norway ASA v Goldman Sachs International* [2000] 2 All ER 679; *Shanghai Contruction (Group) General Co Singapore Branch v Tan Poo Seng* [2012] SGHCR 10; *Caseceli v Natuzzi SpA* [2012] FCA 691; *Citigroup Global Markets Ltd v Amatra Leveraged Feeder Holdings Ltd and Ors* [2012] EWHC 1331; *ET Plus SA v Welter* [2006] 1 Lloyd's Rep 251; *Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals* [2010] 5 MLJ 394; *AV Asia Sdn Bhd v MEASAT Broadcast Network Systems (M) Sdn Bhd & Anor* [2011] 8 MLJ 792. They concluded by submitting that there exist special circumstances for the court to allow the second, third, fourth and fifth defendants' appeal for a stay. They wished to highlight that as the arbitration between the plaintiffs and the first defendant will be completed in a short period of time and resolve all issues before the High Court, there can be no prejudice to the plaintiffs should this stay appeal be allowed.

F *The respondents'/plaintiffs' submission*

G [14] It was the plaintiffs' submission that the second, third, fourth and fifth defendants had failed to show that their case fell within the 'rare and exceptional circumstances' alluded to by the learned JC in respect of the criteria spelt out by Bingham CJ in *Reichhold Norway ASA v Goldman Sachs International*. The said defendants are not parties to the arbitration proceedings unlike the situation in *Reichhold Norway ASA* where Goldman Sachs who had applied for a stay of the court proceedings had an indemnification agreement with Jotun. As and by that application Goldman Sachs wanted the court proceedings against it to be stayed pending the disposal of the arbitration proceedings between Reichhold and Jotun. It was for the reason of the indemnity agreement that the court proceedings was stayed to enable Goldmen Sachs to await the outcome of the arbitration proceedings. Therefore, it was argued that *Reichhold Norway ASA* does not support the said defendants' case.

I [15] It was also submitted that there is nothing that the appellants can show that the liability against them is dependent upon the liability of the first defendant in the arbitration proceedings. Each one of the said defendants

including the first defendant in the pending arbitration proceedings is sued for damages for the tort of deceit and fraudulent misrepresentation. They are sued in their individual capacities as well as joint tortfeasors and their liability indivisible. It was submitted that the outcome of the arbitration proceedings has no bearing on them as it does not apply to them. The said defendants did not disclose an iota of facts or evidence to show in what way the outcome of the plaintiffs' case against the first defendant in arbitration will minimise or exonerate them from their own liability to the plaintiffs and in what way their liability is dependent upon the liability of the first defendant. Accordingly, regardless of the outcome of the arbitration proceedings, the said defendants will have to answer the claim against them in the High Court. To await the completion of the arbitration proceedings is completely unnecessary and is designed to delay and prejudice the prosecution by the plaintiffs' case.

[16] It was the plaintiffs' submission, amongst others, that the said defendants' grounds of appeal for stay have no merit as:

- (a) the said defendants claim that the issues before the arbitration tribunal against the first defendant are the same as those against them in the High Court is questionable because the documents that have been submitted to the ICC Secretariat are confidential to the secretariat, the tribunal and the parties concerned. Even if the issues are the same there is no law to stay proceedings in one in order to await the outcome of the other unless they come within the rare and exceptional circumstances case, which is not so here;
- (b) on Her Ladyship's finding that effect of the Court of Appeal decision in staying the case against the first defendant in favour of arbitration was to separate the proceedings, Her Ladyship was correct because it is true that the Court of Appeal had addressed the point when it said in its grounds of judgment:
 - ... and the fact that the respondents had other defendants should not impact on the right of the appellant to refer the dispute to arbitration,
- (c) with regard to the said defendants' contention that will be a danger of conflicting decisions in the event that the arbitration proceedings and the High Court proceedings are allowed to go concurrently, it is trite law and admitted by counsel for the said defendants orally before the learned JC that the decision of the arbitral tribunal is not binding on the High Court. Consequently, it does not matter if the decision in the said arbitration would be conflicting with the decision against the said defendants in the High Court. Such a matter can be resolved on appeal;
- (d) the Court of Appeal and the Federal Court were well apprised of the facts and circumstances of the case. As such, they would not have ordered a separate trial for the first defendant if they were aware of the

- A 'dangers, risks and pitfalls' in doing so. It is implicit in the earlier Court of Appeal decision when granting the stay to the first defendant, that the proceedings in the arbitration and the proceedings in the High Court could and would be dealt with concurrently;
- B (e) on the fifth defendants' contention that the fifth defendant as solicitor would in any event be bound by his duty of confidentiality to his client, the first defendant, and as such would be unable to give evidence concerning the matters in dispute, of which the first defendant would presumably be giving evidence before the arbitral tribunal, the question
- C whether the fifth defendant is bound by confidentiality or not is a matter for the trial court to decide. Moreover, this point was not raised before the learned JC; and
- D (f) the resulting effect by the dismissal of the plaintiffs' appeal to the Court of Appeal and the application for leave to the Federal Court is that the case against the first defendant has to proceed separately from that against the remaining defendants herein.

- E [17] The plaintiffs therefore submitted that in the interest of justice to the plaintiffs the trial against the said defendants be allowed to proceed to completion. In other words, they prayed that the appeal be dismissed.

THE DECISION

- F [18] As we had indicated earlier, we had allowed the appeal with costs. We had set aside the order of the High Court dated 25 September 2013 and granted the order as prayed for in prayer 1 of the notices of application dated 31 January 2013. We found that there was a fundamental error in her finding in the grounds of judgment of the learned JC at p 61, appeal record, *Jld* 1(1),
- G *Bahagian A* in Appeal No 14, para 30, (referred to in para 7 above) in her finding that the Court of Appeal and the Federal Court had directed the second to the fourth defendants to file the defence when in fact the defences had been filed between March and November 2010. We noted that the Court of Appeal decision was given on 26 April 2011. Having perused the reported case in
- H *Cosmos Industry Solution GMBH v Jacob and Toralf Consulting Letrikon Sdn Bhd & Ors* [2012] 4 MLJ 573, we were certain that the Court of Appeal had never directed the said defendants to file their defences. The learned JC felt bound by these 'directives' which were established to be non-existent. This was a fundamental flaw which rendered Her Ladyship's decision liable to be set aside
- I on appeal.

- [19] However, Her Ladyship's finding that concurrent proceedings are generally undesirable as it will cause confusion and injustice and that if the present proceedings are not stayed there will be the prospect that the

applicants/said defendants will be put to considerable expense and inconvenience of duplicated proceedings are correct findings of facts on the evidence and the pleadings of the parties. They should not be interfered with in these appeals. To us, these findings constituted special circumstances and thus the court's discretion to grant the stay applications was so exercised by us in favour of the said defendants when we granted the order in prayer 1 of the notices of application. We also generally agree with the submissions of the said defendants.

Appeal allowed with costs.

Reported by Kanesh sundrum

A

B

C

D

E

F

G

H

I